

NOVA SCOTIA COURT OF APPEAL

Citation: *Raymond v. Canadian Imperial Bank of Commerce*, 2017 NSCA 74

Date: 20170825

Docket: CA 462482

Registry: Halifax

Between:

Paulette Raymond

Appellant

v.

Canadian Imperial Bank of Commerce

Respondent

Judge: Van den Eynden, J.A.

Motion Heard: July 27, 2017, in Halifax, Nova Scotia in Chambers

Held: Motion for stay dismissed with costs

Counsel: Paulette Raymond, appellant in person
Jeffrey P. Flinn, for the respondent

Decision:

[1] The respondent CIBC obtained a foreclosure order against the appellant Paulette Raymond. Ms. Raymond appealed the order and applied for a stay pending appeal.

[2] I heard Ms. Raymond's motion on July 27, 2017. After reviewing all the materials filed in support of the motion and having heard the parties' respective submissions, I dismissed the motion to stay with reasons to follow together with my decision on costs. My reasons and costs determination now follow.

Background

[3] Ms. Raymond entered into a mortgage with CIBC in June 2014. The principle amount borrowed was \$300,000. The mortgage was secured against Ms. Raymond's home, a portion of which she rents out for income.

[4] Ms. Raymond defaulted on her mortgage and CIBC started foreclosure proceedings in November 2016. Ms. Raymond was served with the Notice of Action and Statement of Claim on November 15, 2016. CIBC gave Ms. Raymond four extensions between December 1, 2016 and February 27, 2017 to file her Notice of Defence. The last extension came and went without a Notice of Defence being filed.

[5] Then on March 3, 2017, CIBC filed an *ex parte* motion seeking an order for foreclosure, sale and possession ("foreclosure order") under *Civil Procedure Rule* 72.07. Although the motion was *ex parte*, counsel for CIBC also provided a copy of the motion and supporting materials to Ms. Raymond (via email) on March 3, 2017. The hearing was scheduled for March 8, 2017.

[6] On March 8, 2017, Justice Gerald R.P. Moir determined the amount owing under the mortgage was \$317, 668.70 and issued a foreclosure order. On March 17, 2017, Ms. Raymond received notice that her property would be sold at a public auction on April 25, 2017.

[7] Ms. Raymond did not appear in the court below on March 8, 2017, file any notice of contest, nor make submissions. The explanation offered was that the email communication notifying her of the hearing got overlooked and she did not read it until after the hearing transpired.

[8] Ms. Raymond filed a Notice of Appeal on April 11, 2017, seeking to set aside the foreclosure order. On June 1, 2017, CIBC filed a motion in the court below for a rehearing of the *ex parte* motion under *Rule 22.06*. Under 22.06(3) a judge rehearing the motion may set aside, vary or continue the order. CIBC requested a continuation of the foreclosure order.

[9] The motion to rehear was heard by Justice Moir on June 22, 2017. In the interim the parties had agreed to a postponement of the public auction and a consent order was issued to that effect on April 13, 2017.

[10] On the motion to rehear both CIBC and Ms. Raymond filed affidavit evidence and written submissions, and both parties made oral submissions to the motions judge. Following the hearing, the motions judge issued an order on June 28, 2017 which suspended the order postponing the public auction and permitted CIBC to proceed to sell Ms. Raymond's property at a public auction upon providing notice as set out in the foreclosure order issued on March 8, 2017. Ms. Raymond indicated it was also her intention to appeal the June 28, 2017 order, and she was directed by this Court to file an Amended Notice of Appeal.

[11] As noted, the property subject to the foreclosure order is Ms. Raymond's home, and she rents out a portion of her home to generate income. She wants to continue residing in her home and generate rental income pending her appeal. As I will explain in more detail later, she asserts that a failure to grant a stay pending appeal will cause her irreparable harm, including emotional, psychological and financial harm.

[12] Although Ms. Raymond is a self-represented litigant, she is no stranger to litigation and court processes. She would be familiar with the importance of required filings and deadlines. Ms. Raymond never filed a Notice of Defence to the foreclosure action. She is of the view that the materials she filed in the court below on the rehearing and on this motion amount to an "unofficial" defence and counterclaim. The materials do not resemble a defence or counterclaim against CIBC. Nor do I have to address this particular point in order to determine the stay motion.

[13] It appears that Ms. Raymond fell on some tough financial times and she maintains CIBC and its representatives treated her in an improper manner. Her long list of complaints include intimidation, oppression, retaliation, abuse of process, sharp practise, and breach of duty of care, to mention a few.

[14] She also has a long list of complaints with the applicable foreclosure procedures. She sees them as favoring the banks and working against self-represented litigants such as herself, and as procedurally unfair and unconstitutional. However, Ms. Raymond does not dispute she entered into a mortgage with CIBC in June 2014. She does not dispute that she failed to make any payments under the mortgage since June 2015 and has also failed to pay her property taxes as required.

[15] Ms. Raymond has had the benefit of residing in her home and collecting rental income for the past two-plus years while being in default of her obligations under her mortgage with CIBC. It appears Ms. Raymond may hold the view that her liability under the mortgage is or should be impacted because of how CIBC acted towards her, and furthermore CIBC should owe her money for the harm it allegedly caused her.

[16] I will supplement additional background as needed when addressing the specific requirements of the legal test for stay pending appeal.

Legal principles and analysis

[17] Upon filing a notice of appeal an appellant is not granted a stay as of right in Nova Scotia. *Civil Procedure Rule* 90.41 (1) provides that the filing of a notice of appeal shall not operate as a stay of execution or enforcement of the judgment appealed from. *Rule* 90.41(2) provides that a judge of this Court, may, pending disposition of the appeal, order stayed the execution and enforcement of any judgment appealed from or grant such other relief against such a judgment or order, on such terms as may be just.

[18] In *Westminer Canada Ltd. v. Amirault* (1993), 125 N.S.R. (2d) 171 (C.A.) (in Chambers), Freeman J.A. said, “Stays deprive successful parties of their remedies, and they are not granted routinely in this province. They are equitable remedies and the party seeking the stay must satisfy the court it is required in the interests of justice.”

[19] The test this Court uses when determining a motion for stay is clearly established (see *Fulton Insurance Agencies Ltd. v. Purdy*, 1990 NSCA 23 (in Chambers)). The primary test set out in *Fulton* places the burden upon the applicant, in this case Ms. Raymond, to satisfy me, on a balance of probabilities, that: (a) there is an arguable issue raised on appeal; (b) if the stay is not granted and the appeal is successful, Ms. Raymond will have suffered irreparable harm that

is difficult to, or cannot be compensated for by a damage award; and (c) the balance of convenience favours a stay. In other words, Ms. Raymond would suffer greater harm if the stay is not granted than CIBC would suffer if the stay is granted.

[20] Should Ms. Raymond fail to meet the above primary test, *Fulton* sets out a secondary test; namely, to satisfy me that there are exceptional circumstances which justify the granting of a stay.

[21] On the first prong of the primary test (arguable issue) it is not for me to delve into the substantive merits of the appeal. Rather, the inquiry focuses on whether the notice of appeal contains realistic grounds, which if established, could be of sufficient substance to persuade a panel of this Court to allow the appeal (see *Federated Life Insurance Company v. Fleet*, 2008 NSCA 90 (in Chambers)). Although the respondent put forth a compelling argument that Ms. Raymond's notice of appeal does not disclose any realistic or arguable grounds of appeal, I need not determine that aspect of the primary test, nor the third prong (balance of convenience). I say that because Ms. Raymond has failed to establish the requisite irreparable harm.

[22] The concept of irreparable harm does not have an exact nor exhaustive definition; rather, the concept is driven by the context of each particular case. In *Nova Scotia v. O'Connor*, 2001 NSCA 47 (in Chambers), Cromwell J.A. (as he then was) wrote:

[12] The term "irreparable harm" comes to us from the equity jurisprudence on injunctions. In that context, it referred to harm for which the common law remedy of damages would not be adequate. As Cory and Sopinka, JJ. pointed out in *RJR — MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 312 at 341, the traditional notion of irreparable harm is, because of its origins, closely tied to the remedy of damages.

[13] However, in situations . . . which have no element of financial compensation at stake, the traditional approaches to the definition of irreparable harm are less relevant. As Robert J. Sharpe put it in his text, *Injunctions and Specific Performance* (Looseleaf edition, updated to November, 2000) at § 2.450, ". . . irreparable harm has not been given a definition of universal application: its meaning takes shape in the context of each particular case."

[23] Fichaud J.A. in *National Bank Financial Ltd. v. Barthe Estate*, 2013 NSCA 127 (in Chambers) wrote:

[16] In *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at p. 341, Justices Sopinka and Cory for the Court said that irreparable harm “is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other”.

[17] *Wright v. Nova Scotia Public Service Long Term Disability Plan Trust Fund*, 2006 NSCA 6, says:

[12] Generally, if the judgement is monetary, the appellant (applicant for a stay) can afford to pay and the respondent can afford to repay, there is no irreparable harm. But a real risk that the respondent would be unable to repay may establish irreparable harm. [citations omitted]

[24] It is understandable that Ms. Raymond wants to remain in her home and continue to generate some ongoing rental income pending the disposition of her appeal. It is also understandable that her home is of personal importance to her. However, that is not the test. She must establish irreparable harm that is difficult to, or cannot be compensated for by a damage award (*Fulton*).

[25] Ms. Raymond submitted affidavit evidence that she advertised the apartment in her home on an online site at \$159 per night (with a two night minimum stay) and targeted business, vacation and study travellers. In her oral submissions, Ms. Raymond explained that from May to August she targeted shorter term rentals and longer term rentals from September to April. Ms. Raymond submitted that her rental business is currently profitable, and is providing her with a self-sustaining income. She, however, provided no evidence of the rental unit’s profits to the Court. Furthermore, as is evident from CIBC’s evidence, Ms. Raymond did not re-direct any of these asserted profits into her mortgage to sustain her business, as she has not paid anything towards her mortgage since June 2015.

[26] In addition to the disruption of her rental business and any associated financial losses, Ms. Raymond argues that conducting her rental business is part of her “identity”. And, if she lost her home and business, she would thus lose her identity, which money could not repair. This anticipated loss of personal identity was based solely on general statements made by Ms. Raymond and was speculative at best.

[27] CIBC argues that should it proceed to sell Ms. Raymond’s property at a public auction, which it is entitled to do under the foreclosure order, and should Ms. Raymond succeed on her appeal and have the foreclosure order set aside, any harm can be quantified in monetary terms. CIBC correctly points out that there is no evidence that the property subject to the foreclosure order is otherwise special

or unique. The foreclosure action itself involves a quantifiable mortgage debt and, as noted, should Ms. Raymond succeed on any (yet to be filed) future claim against CIBC for her loss of income or other damages, they too could be repaired by monetary damages. If Ms. Raymond is ultimately successful and would like to resume her identity as a landlady, CIBC contends she can buy another property to rent. Furthermore, there is no evidence before me that CIBC would be unable to pay an award of damages. To the contrary, respondent counsel submits, CIBC, a chartered bank, possesses sufficient resources to indemnify Ms. Raymond for any financial losses or respond to any subsequent damage claims, should her appeal prove successful.

[28] In my view, the evidence and submissions by Ms. Raymond fall well short of establishing irreparable harm should a stay not be granted. I agree with the submissions from CIBC that any harm is quantifiable, at least theoretically, and can be adequately compensated by damages. Further, there is no identified risk that Ms. Raymond might be unable to collect from CIBC.

[29] Having determined that Ms. Raymond failed to meet the primary test for a stay, I turn to whether exceptional circumstances otherwise exist which would justify the granting of a stay. There is no exhaustive or comprehensive definition of “exceptional circumstances” for *Fulton’s* secondary test. It is applied only when required in the interests of justice. Its use permits the court to protect against an injustice in circumstances which escape the attention of the primary test (see *Brett v. Amica Mature Lifestyles Inc.*, 2004 NSCA 93 (in Chambers)).

[30] Ms. Raymond argues to the effect that CIBC is only concerned with money and has no empathy for her situation, nor the personal and financial damage she will suffer if her home is foreclosed upon and sold at a public auction. CIBC points out that Ms. Raymond entered into a valid mortgage with CIBC. She thus assumed the risk of foreclosure resulting from non-payment. CIBC submits there are no exceptional circumstances. Rather, Ms. Raymond defaulted on her mortgage and CIBC is simply exercising its remedy as a secured creditor.

[31] Based on the limited record before me, this is clearly not a situation where the judgment appealed from contains errors so egregious that it is clearly wrong on its face. Far from it. The fact that the property subject to foreclosure is a personal residence and is used in part to generate rental income is not in and of itself an exceptional circumstance. Personal residences and businesses are routinely foreclosed upon. Neither the rental of Ms. Raymond’s home nor the loss of

asserted profits and identity as a landlady transport her case into the realm of the exceptional, as contemplated by *Fulton*. Furthermore, I reiterate that, in my view, any future proven losses suffered by Ms. Raymond could be adequately compensated by damages. I am satisfied that, in these circumstances, there is nothing before me that could be considered as exceptional circumstances.

[32] For the foregoing reasons, the motion to stay was dismissed.

[33] Both parties submitted a request for costs in the amount of \$1,000.00 which, in my view, is reasonable. Costs in the amount of \$1,000.00 (inclusive of disbursements) are payable by Ms. Raymond to CIBC, forthwith.

Van den Eynden, J.A.